No. 95-129

In The

Supreme Court of the United States

October Term, 1995

EXXON COMPANY, U.S.A.;
EXXON SHIPPING COMPANY,

Petitioners,

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.;
HAWAIIAN INDEPENDENT REFINERY, INC.; PRI
MARINE, INC.; PRI INTERNATIONAL, INC.,

Respondents,

v.

GRIFFIN WOODHOUSE, LTD.; BRIDON FIBRES
AND PLASTICS, LTD.,

Third-Party Respondents.

HIRI RESPONDENTS' BRIEF ON THE MERITS

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February 7, 1996

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether *Reliable Transfer*'s adoption of comparative fault precludes the application of the doctrine of superseding cause under federal admiralty law.

2. Whether, on the basis of unchallenged findings that the stranding was not a foreseeable consequence of the respondents' conduct but instead was a consequence Exxon could have avoided, the trial court was correct in entering a judgment that denied Exxon recovery for damages relating to the stranding of its vessel.

LISTING UNDER SUP. CT. R. 29.1

This brief is filed on behalf of respondents Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc. (collectively "HIRI"). These respondents are all subsidiaries of The Broken Hill Proprietary Company, Ltd., which is incorporated in Victoria, Australia. There are no other parent corporations or subsidiaries (except wholly-owned subsidiaries).

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OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Exxon Shipping Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995). A copy of the opinion is reprinted in the Joint Appendix ("JA") at 209-33. The district court's findings of fact and conclusions of law are reprinted at JA 140-76, and its judgment is reprinted at JA 201-06.

JURISDICTION

The opinion of the court of appeals was filed on April 26, 1995. Exxon's petition for rehearing was denied by order entered May 24, 1995; a copy of the order is included in the certiorari petition as Appendix B. The district court's jurisdiction was in admiralty, pursuant to 28 U.S.C. § 1333. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1). The petition for writ of certiorari was filed on July 24, 1995, and this Court's order granting certiorari was issued on November 22, 1995.

STATEMENT OF THE CASE

This case arises out of the stranding of Exxon's oil tanker near Barbers Point off the island of Oahu. Exxon's Captain Coyne drove the tanker onto a charted reef at 8:09 p.m. (2009 military time).[1] Nearly three hours earlier, the tanker had broken away from HIRI's "single point

[1] The opinions below employ military time, and, for consistency with the record, references to time in this brief will follow that practice.

mooring" buoy (the "SPM"), where it was discharging oil into cargo hoses.[2] The SPM is situated in deep water, one and one-half miles off the coast. The SPM is not confined in a bay or harbor but is, instead, situated in open ocean.

Summary of Facts

At 1728, in the midst of a "Kona" storm,[3] Exxon's tanker broke away from the SPM. Approximately 840 feet of hose remained bolted to the tanker, and, concerned that the hose might foul the propeller if the vessel went forward, the vessel's captain backed the tanker away from the SPM. [JA 146-47 (¶¶25-29)][4] Captain Coyne backed the tanker for twelve minutes, to a safe anchorage, and attempted to deploy the anchor. For unexplained reasons, Captain Coyne chose not to pay out the additional "shots" of chain needed to hold the tanker in place,

[2] Respondents Pacific Resources, Inc., PRI International, Inc., and Hawaiian Independent Refinery, Inc. are affiliated companies and own or operate the SPM. [JA 141 (¶2)] The oil is discharged through hoses into submerged pipelines that run along the sea floor to the on-shore refinery. [JA 146 (¶23)]

[3] A "Kona" storm has winds and seas generally from the south and toward the coast.

[4] At 1715, the chafe chain holding the tanker to the SPM parted, allowing the tanker to drift away from the SPM. As the tanker drifted, the two cargo hoses broke, the first at 1725 and the second at 1728. The first hose broke near the water line and was not a factor in the subsequent handling of the tanker. The parting of the second hose was designated by the district court as the "breakout." [JA 146-47 (¶¶25-28)] All references hereafter to the "hose" are to the second hose.

and the attempt to anchor failed.[5] Even though the tanker's subsequent course took it through numerous safe anchorages, Captain Coyne never again attempted to deploy the anchor. [JA 150 (¶¶41-42)]

After bringing the anchor home, Captain Coyne began backing the tanker in a generally westerly direction out to sea and away from shallow water. By 1803, an assist vessel, the Nene, had secured the end of the hose and was able thereafter to keep it away from the tanker's rudder and propeller. The tanker continued to back in its westerly direction out to sea until 1830. [JA 150 (¶¶43-44)]

Under Captain Coyne's direction, the position of the tanker had been fixed and plotted on navigational charts at 1740, 1747, 1803, 1820, and 1830. [JA 150 (¶44)] However, after 1830, no additional navigational plots were taken until 2004, a lapse of more than one and one-half hours. Ship personnel were available to plot navigational fixes, but, again for unexplained reasons, Captain Coyne failed to employ them. Instead, he attempted to navigate by "parallel indexing," a technique that utilizes radar only. Navigation by parallel indexing without plotted fixes is inherently dangerous and is a violation of both industry standards and Exxon's own policies and guidelines. [JA 152-53 (¶¶49, 54-57)]

At 1831, Captain Coyne made the decision to quit backing out to sea, although he could have continued to do so. [JA 151 (¶46)] Instead, he began directing the

[5] It is standard practice to release additional shots of chain to enhance the holding power of the anchor. Five or six shots of chain would have been required to hold the tanker under the prevailing conditions. [JA 148-49 (¶¶35-38)]

tanker in a series of alternating forward and backward movements. This was done to create a lee on the port side of the tanker to allow the hose to be disconnected with reduced exposure to wind and sea conditions. It took more than one hour to disconnect the hose. [JA 151-52 (¶48); 156 (¶64)] During this entire time, notwithstanding the prevailing winds that had a tendency to push the tanker toward the coast, no navigational fixes were plotted. [JA 152 (¶49)]

At 1944, after the hose had been disconnected and was suspended from the tanker's crane (for lowering into the water), the tanker and Nene moved apart, causing the crane to collapse. The hose fell free, and, at 1947, the Nene pulled the hose clear of the tanker. However, the collapse of the crane injured the crane operator, who was taken to his quarters. Captain Coyne sent the second mate from the bridge to determine the condition of the crane operator, which left Captain Coyne as the only officer on the bridge until 2000. Other officers were available for bridge service, but Captain Coyne did not call for them. [JA 156 (¶¶64-69)]

At 1956, Captain Coyne ordered a slow right turn toward the coast. Before starting the turn, he did not look at the navigational chart and did not plot and fix the tanker's location. As noted earlier, no navigational fix had been taken since 1830, and the location of the vessel was not known. When the third mate arrived on the bridge around 2000, Captain Coyne directed him to plot a navigational fix, which was completed at 2004, eight minutes into the right turn. [JA 158 (¶81)]

When Captain Coyne saw the plotted fix on the navigational chart, he uttered an expletive and increased speed to "half ahead," which he increased ninety seconds later to "full ahead." The tanker stranded at 2009 on a charted reef. [JA 159 (¶¶82-83)]

Procedural History

Exxon brought suit to recover damages for the loss of the tanker. Exxon sought such damages under a variety of legal theories, including negligence, products liability, and express and implied warranties.[6] HIRI filed a third-party action against Bridon Fibres and Plastics, Ltd., Griffin Woodhouse, Ltd., and Werth Engineering, Inc., seeking contribution and indemnity.[7] All respondents raised affirmative defenses and asserted that it was the egregious misconduct of the vessel's captain that placed the tanker in danger and was the cause of the stranding.

Respondents[8] moved for bifurcation, arguing

1. that the issue of who was responsible for the breakout was independent of whether the breakout was a proximate cause of the stranding,
2. that, given (a) the extended lapse of time and distance between the breakout and the stranding and (b) Exxon's extraordinary

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[6] Exxon sued HIRI for negligence, express and implied warranties of safe berth, and implied warranty of workmanlike performance. Exxon sued Sofec, Inc. (who manufactured the SPM) for negligence, strict product liability, and breach of implied warranties of merchantability and fitness for purpose.

[7] The third-party defendants manufactured and supplied the chafe chain holding the tanker to the SPM. Werth was dismissed from the action before trial.

[8] Griffin filed the motion, which was joined by the other respondents and was opposed by Exxon. [JA 59]

mishandling of the vessel, there was a substantial question whether Exxon's conduct was a superseding cause, and

3. that trying this distinct and potentially case-dispositive issue at the outset could result in significant time and cost savings for the court and the parties.

The district court granted the motion and bifurcated the case, with phase I principally focused on determining the legal or proximate cause of the event of the stranding (*i.e.* whether the stranding was proximately caused by one or more of the following: (a) the breakout, (b) Exxon's post-breakout navigation, or (c) HIRI's post-breakout violations of a safe berth clause). *See* JA 71-74; JA 161 (¶4). The district court reserved the right to examine, in a phase II trial, the causes leading to the event of the breakout. [JA 73-74]

After a bench trial, the district court issued findings of fact[9] and conclusions of law, which may be summarized as follows:

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[9] References to findings made by the district court are to the joint appendix, by page and paragraph number (*e.g.*, JA ___ (¶___)). Some fact findings appear in the section labeled "conclusions of law," but this does not change their true nature. Regardless of the label attached, they are, in actuality, questions of fact to be decided by the factfinder. *See* 9A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2579 at 537 (1995) ("an appellate court will regard a finding or conclusion for what it is, regardless of the label the trial court may have put on it"). *See also Mentor Insurance Co. (U.K.) Ltd. v. Norges Brannkasse*, 969 F.2d 506, 513 (2d Cir. 1993); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536 (6th Cir. 1992), *cert. denied*, 507 U.S. 517 (1993); *Comdisco, Inc. v. United States*, 756 F.2d 569, 575 (7th Cir. 1985); *Turpen v. Missouri K.T.R.R.*, 736 F.2d 1022, 1026-27 n.5 (5th Cir. 1984); *Tri-Tron International v. Velto*, 525 F.2d 432, 435 (9th Cir. 1975). The district judge expressly provided for

1. The captain of Exxon's tanker was "grossly and extraordinarily negligent" in his handling and navigation of the tanker.
2. Such conduct was a superseding cause and the sole proximate cause of the stranding.
3. Such conduct was not a foreseeable consequence of the breakout.
4. The stranding of the tanker could have and would have been avoided if Captain Coyne had done any of the following –
   (a) plotted and fixed the tanker's location in a timely and proper fashion,
   (b) ensured that the bridge was properly manned,
   (c) turned toward open ocean rather than toward the coast,
   (d) backed out to open ocean rather than turning toward the coast.[10]

Thereafter, the district court entered judgment under Rule 54(b) denying Exxon's claims for all damages resulting from the stranding.[11] [JA 201-03][12]

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possible imprecision in labeling. "To the extent that any findings of fact herein are more properly construed as conclusions of law, they shall be so construed; and to the extent any conclusions of law are more properly construed as findings of fact, they shall be so construed." [JA 141]

[10] The district court found that Captain Coyne could easily have taken any of the listed actions. *See* JA 153 (¶54); 156 (¶69); 158 (¶79).

[11] Unless otherwise stated, references to "Rule" are to the Federal Rules of Civil Procedure.

[12] Exxon's claims for damages associated with the breakout itself, *e.g.*, clean-up costs related to the oil spilled when the

Exxon appealed to the Ninth Circuit, which affirmed. The Ninth Circuit rejected Exxon's argument that the doctrine of superseding cause had been eliminated by this Court's decision in *Reliable Transfer*. 54 F.3d at 573-75. [JA 219-26][13]

Rehearing was denied,[14] and this Court granted certiorari on November 22, 1995.

PRELIMINARY STATEMENT REGARDING SCOPE OF QUESTIONS PRESENTED

The bifurcation and due process issues addressed in Exxon's brief and the brief of the *Amicus* are not fairly embraced within the questions presented in Exxon's petition for writ of certiorari. This Court, therefore, need not address those issues. *See* Sup. Ct. R. 14.1; *Yee v. Escondido*, 503 U.S. 519 (1992). As these matters consume a significant portion of Exxon's brief, and virtually all of the brief of the *Amicus*, the HIRI respondents address them herein.

cargo hoses broke, remain to be tried. Accordingly, the judgment was entered under Rule 54(b) as a judgment "upon less than all claims and as to less than all parties." [JA 201]

[13] The Ninth Circuit also held that the district court's decision to bifurcate was not an abuse of discretion but was "expeditious and appropriate in light of the circumstances." 54 F.3d at 576. [JA 226] The Ninth Circuit rejected Exxon's limited challenge under Rule 52, holding that the challenged findings were "well supported by the record." 54 F.3d at 579. [JA 233]

[14] *See* Appendix B to Exxon's petition for writ of certiorari.

SUMMARY OF ARGUMENT

The central premise of Exxon's argument here is that superseding cause did not survive this Court's adoption of comparative fault in *Reliable Transfer*.[15] Unless Exxon is correct, which it is not, the trial court properly rendered judgment for respondents on its findings that the actions of the captain of the Exxon Houston following the breakout were "gross negligence," a "superseding cause" of the grounding of the vessel, and "unforeseeable" from the perspective of the respondents.

The "facts" set forth so extensively by Exxon in its brief are principally its own argumentative interpretation of conflicting evidence. Neither the questions presented in Exxon's petition for writ of certiorari nor indeed its brief on the merits contains any reference to Rule 52 or any claim that the trial court's extensive findings of fact were "clearly erroneous." This fact-intensive case is thus required to be determined on the basis of the trial court's findings, not Exxon's argument.[16]

In *Reliable Transfer*, this Court simply replaced the "divided damages" rule with the rule of "comparative fault." It did not explicitly or implicitly eliminate the then well-established doctrine of superseding cause. Furthermore, *Reliable Transfer* did not restrict in any respect the discretion of trial courts under Rule 42 to bifurcate causes. It did not compel trial judges under the aegis of due process protection to hear all evidence offered by all parties in a single, unphased trial under circumstances

[15] *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

[16] Certain of the trial court's findings were challenged below. The Ninth Circuit upheld the trial court. The "two-court rule" is thus in play. *See Reliable Transfer*, 421 U.S. at 401 n.2.

where the trial court viewed the more efficient approach to determine first whether there was a "superseding cause," thereby eliminating the necessity of an otherwise unnecessary expenditure of the time and resources of the Court and the parties.

Nothing in *Reliable Transfer* necessitates the elimination of the doctrine of superseding cause or suggests, expressly or impliedly, that this would be the result of the decision. It was indeed urged upon the Court by the brief of the United States that this Country's maritime law could be brought into line with that of other nations without upsetting related rules of law or settled expectations. The Court quoted the following language from what it described as "a leading admiralty law treatise,"

> "The abrogation of the [divided damages] rule would not, it seems, produce any disharmony with other branches of the maritime law, general or statutory."

421 U.S. at 410.[17]

Superseding cause and comparative fault coexist in harmony in various branches of admiralty law, in state law, and in the maritime law of other nations. Nothing was said in *Reliable Transfer* then, and no credible rationale is advanced now, supporting Exxon's theory that comparative fault and superseding cause are not administratively, practically, and in legal theory wholly compatible.

Exxon's reliance on *Italia Societa* is similarly misplaced. The facts are different. The issues are different. The expressions of policy on which Exxon places such

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[17] Referencing Grant Gilmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY § 7-20 at 531 (1975).

reliance neither fit the situation here nor present a concrete, applicable rule of law. *Italia Societa* simply has nothing to do with Exxon's warranty claims. Rather, it is the trial court's findings on foreseeability and avoidable consequences that are relevant and controlling here. Recognizing that "foreseeability" may be viewed differently under contract and tort, it is unquestioned that liability for contract breach does not extend beyond that which is foreseeable. It was not error, therefore, for the trial court to render judgment under Rule 54(b) on the finding that the grounding of the Exxon Houston was the result of the captain's gross negligence, was not a foreseeable event, and thus was not an event for which damages would be awarded, even assuming a breach of express or implied warranty. Similarly, the district court's finding that the stranding was a consequence that the tanker captain could have readily avoided also supports the entry of judgment denying recovery of stranding-related damages under the warranty claims.

A substantial portion of Exxon's brief and virtually all of the brief of the *Amicus* are devoted to the claim that the trial court's action in bifurcating the trial under Rule 42 was unlawful and that the resulting allocation of admissible evidence between the phased proceedings was a violation of Exxon's due process rights under the Fifth Amendment. The questions presented by Exxon in its petition for writ of certiorari and restated in its brief on the merits contain no reference to the Rule 42 bifurcation or to due process, nor are such issues fairly embraced within the questions presented in the petition. It is not, therefore, necessary for this Court to address these issues. Sup. Ct. R. 14.1(a). In any event, however, mischievous forces would be unleashed were this Court to hold, as

Exxon and the *Amicus* argue, that bifurcation in jurisdictions applying comparative fault is foreclosed by law and that any exclusion of evidence in phased proceedings would violate due process. The problems that would ensue in state and federal practice are readily apparent.

The judgment of the trial court was correct. It was supported by unchallenged findings of fact and was properly affirmed. No constitutional issues are implicated, and none is properly before this Court. The extraordinary misconduct of the tanker captain was found, as a matter of fact, to constitute a superseding cause and an unforeseeable event. These findings foreclose the relief Exxon seeks. Contrary to Exxon's argument, when *Reliable Transfer* sunk the divided damages rule, superseding cause did not go down with the ship.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS THAT EXXON'S MISCONDUCT CAUSED THE STRANDING CONCLUDE THE MATTER

A persistent theme running throughout Exxon's brief is the notion that there was something unjust about holding Exxon responsible for the loss of its own tanker. Not so.[18] The findings of the district court demonstrate that the stranding was solely the fault of Exxon. Exxon pleads for the assignment of blame to the breakout, but the force

[18] The district court concluded that "[i]t would be manifestly unjust to hold anyone legally responsible for the consequences of these acts other than Captain Coyne and his employer, Exxon." [JA 176 (¶46)]

associated with the breakout had run its course and was spent long before the stranding occurred.

Exxon makes no pretense in this Court of challenging the district court's findings under Rule 52 as "clearly erroneous" and is, therefore, bound by those findings. Undeterred, Exxon blithely recites its version of events even though that version is expressly contradicted by the findings of the district court. This ongoing attempt to deflect the blame surfaces in a variety of factual misstatements, which are addressed below.

A. Exxon's misstatement that the conduct of the vessel's captain was "heroic" but that the stranding was unavoidable

Exxon makes the incredible claim that the tanker captain "performed heroically" but could not prevent the stranding. That argument is absolutely and flatly repudiated by the express findings of the district court. Exxon's version of the event is as follows:

> In our case, Captain Coyne and the crew of the HOUSTON performed heroically in trying to rescue the vessel and her seamen from the constant perils in which respondents' misconduct placed them. In the last few minutes, they were unable to save the ship. . . .

[Exxon br. 26] The district court's findings of fact tell a different story:

> Captain Coyne acted negligently, unreasonably and in violation of the maritime industry standards. . . .
>
> Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of

> stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.
>
> Captain Coyne's final starboard turn was grossly and extraordinarily negligent and in violation of the maritime industry standards because he commenced it without knowing the vessel's position.

[JA 170 (¶36) (omitting listing of particulars); 171 (¶¶37-38)] There is nothing heroic in gross negligence. Exxon's attempt to turn matters upside down should be rejected.

Exxon's suggestion that the stranding was unavoidable is also expressly refuted by the district court's findings. *See, e.g.*, JA 171 (¶37) ("danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON"); JA 171 (¶39) ("danger of stranding could and would have been avoided had Captain Coyne backed out or ordered a left turn instead of attempting a right turn").

Contrary to the version that Exxon now advances, the district court summarized the situation as follows:

> Although the breaking of the mooring chain imperilled [sic] the ship, the EXXON HOUSTON successfully avoided that peril. By 1830, the EXXON HOUSTON was heading out to sea and in no further danger of stranding. Only the grossly negligent actions of its master endangered the vessel further.

[JA 175 (¶46)] The conduct of the vessel's captain cannot be characterized as "heroic." Rather, it was the sole cause of the stranding.

B. Exxon's attempt to create the mistaken impression that the tanker was in constant peril from the breakout to the stranding

Throughout its brief, Exxon attempts to create the impression that the tanker was in constant and continuous peril from the time of breakout at 1728 through the time of the stranding more than two and one-half hours later. That impression is not true and is expressly contradicted by the trial court's findings.

> Over two and one-half hours elapsed between the breakout and the stranding. During that period, Captain Coyne and his crew had ample time to consider the situation calmly and deliberately.

[JA 159 (¶85)] *See also* JA 175 (¶46) ("By 1830, the EXXON HOUSTON was heading out to sea and in no further danger of stranding.").

Exxon suggests that the cargo hose "posed a continuing danger" to the tanker, but, again, the district court found otherwise. [JA 150 (¶43)] As the Ninth Circuit noted below, "By 1803, the small assist vessel *Nene* was able, with the assistance of the *Houston*, to get control of the end of the second hose so that it was no longer a threat to the larger ship." 54 F.3d at 572. [JA 216] Exxon also contends that the tanker was "*in extremis*" and that Captain Coyne and his crew were "valiantly dealing with a whole succession of emergencies." [Exxon br. 26] Again, Exxon's version of the event is at odds with the district court's findings.

> Exxon has argued that the EXXON HOUSTON was *in extremis* from the time of the breakout to the time of the stranding, and that Captain Coyne's conduct should be judged by that more lenient standard. As Captain Coyne's

> decisions were made calmly, deliberately and without the pressure of an eminent peril, the *in extremis* rule cannot be applied in this case.

[JA 170 (¶¶33-34) (citations omitted)]

The district court's findings, reviewed and upheld by the Ninth Circuit, arrest any notion that the tanker was in constant peril.

C. Exxon's misstatement that HIRI had "conceded" that its conduct was a substantial factor in causing the stranding

Exxon mistakenly represents that respondents have "conceded" that their conduct was a "substantial factor" in causing the stranding. [Exxon br. 17] Exxon's apparent objective is to create the impression that HIRI agreed that its conduct played a significant role and was a proximate cause of the stranding. Neither HIRI nor any of the other respondents ever made any such concession.

In connection with the bifurcation below, the district court, on the suggestion of respondents, assumed that the breakout was a "cause in fact" of the stranding (*i.e.*, if the tanker had still been moored at the SPM, it would not have stranded). This does not equate to a "concession" that the breakout, or any respondent's responsibility for the breakout, was a "substantial factor" in bringing about the stranding.

Far from making any such concession, it has been respondents' position throughout that the stranding was caused solely by Exxon; the effects of the breakout more than two and one-half hours earlier had long since dissipated. The unalterable fact of the matter is that respondents played no part in Exxon's half-hearted attempt to anchor, no part in Exxon's decision to leave and ignore

the various positions of safety, and no part in Exxon's failure to plot and fix navigational positions. Exxon, not respondents, was at the helm when the final starboard turn was ordered.

D. The notion that the tanker captain had "no reason" to know that the tanker was in the vicinity of a charted reef

The most astonishing of Exxon's misstatements is its straight-faced assertion that Captain Coyne had "no reason" to know that the tanker was approaching the charted reef on which it ultimately stranded.

> The Captain had no reason to anticipate that the tanker would be anywhere near the stranding area until the whole chain of incidents occurred after the chain parted.

[Exxon br. 15] That assertion strains credulity.

Perhaps the most important responsibility of a vessel's captain – especially in reef-laden coastal waters – is to know the vessel's location and to keep it off the rocks. Exxon's claim that its captain had "no reason" to know his location or the dangers surrounding his command cannot be taken at face value and is, once again, contradicted by the express findings of the district court. It was Captain Coyne's duty to know, and the only reason he did not was because he failed to plot and fix the tanker's position at any time between 1830 and 2004. [JA 152 (¶49)] The district court found as follows:

> A prudent mariner would have fixed and plotted his vessel's position at least every 15 to 20 minutes in the situation in which the EXXON

HOUSTON found itself after 1830 on March 2, 1989.

[JA 152 (¶52)]

It was Captain Coyne's duty, as a prudent mariner, to plot positions "at least every 15 to 20 minutes." Instead, he let one and one-half hours go by without doing so and did not obtain a plotted fix until he was eight minutes into the injury-producing turn toward the coast. Captain Coyne testified that, rather than plotting fixes, he navigated by "parallel indexing," but that does not cure his misconduct. Again, from the district court's findings:

> Parallel indexing is not a substitute for fixing the position of the vessel. Navigation by parallel indexing without plotting fixes is inherently dangerous and a violation of industry standards.

[JA 153 (¶56)] Exxon's own Navigation and Bridge Organization Manual condemns the practice.

> Parallel indexing does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes.
>
> . . . .
>
> FAILURE TO FOLLOW THE ABOVE PRECAUTIONS OR TO PROCEED WITHOUT RELIABLE CHARTED FIXES IS DANGEROUS. PARALLEL INDEXING IS A SUPPLEMENTAL NAVIGATIONAL TECHNIQUE ONLY.

[JA 153-54 (¶57) (capitalization in original)]

The district court rejected the notion that Captain Coyne had "no reason" to know. Instead, he was found grossly and extraordinarily negligent because he did not know.

> Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.

[JA 171 (¶37)]

The stranding occurred more than two and one-half hours after the breakout; the potential risks associated with the breakout had long since dissipated. During that time, Exxon was in full control of the tanker and made its decisions regarding anchoring, maneuvering, and navigation without input from or involvement of respondents. Accordingly, the district court properly found Exxon's conduct to be the sole cause of the stranding, and judgment was properly entered reflecting those findings. That judgment should be affirmed.

II. *RELIABLE TRANSFER* IS WHOLLY CONSISTENT WITH THE RESULT BELOW

Exxon contends that the result below is inconsistent with this Court's decision in *Reliable Transfer*. That argument, however, finds no support in *Reliable Transfer* and is repudiated by decisions in admiralty cases across nearly every circuit. Contrary to Exxon's argument, the doctrine of superseding cause was firmly embedded in admiralty law prior to *Reliable Transfer* and remains so today.

A. *Reliable Transfer* did not overrule or eliminate the doctrine of superseding cause

Although Exxon contends that *Reliable Transfer* eliminated the doctrine of superseding cause, Exxon has not identified, and cannot identify, any textual support for that contention. Superseding cause was neither briefed, argued, nor addressed in *Reliable Transfer*. It was not even discussed in the Second Circuit's opinion. *See* 497 F.2d 1036 (2d Cir. 1974).

The holding of *Reliable Transfer* is narrow and precise:

> In the present case we are called upon to decide whether this country's admiralty rule of divided damages should be replaced by a rule requiring, when possible, the allocation of liability for damages in proportion to the relative fault of each party.
>
> . . . .
>
> We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. . . .

421 U.S. at 398, 411.

Reliable Transfer was not directed at superseding cause or any other aspect of legal causation. Rather, it was directed at the divided damages rule. Under that rule, regardless of the relative fault of the parties involved in a collision or stranding, liability for the resulting damages was divided equally among the parties at fault (*i.e.*, the damages were aggregated and then apportioned equally). *See* 421 U.S. at 400 n.1. The adoption of comparative fault did not change superseding cause, and there was no reason to expect that it would.

Comparative fault and superseding cause are distinct and independent legal concepts. Superseding cause, of course, is part of proximate cause analysis, and both superseding and proximate cause focus on whether a party's conduct constitutes a legal cause of the injury. By contrast, neither the divided damages rule nor comparative fault is directed at legal cause, but, instead, both seek to allocate relative responsibility for damages in those circumstances in which collective liability has been determined to exist.

The independent nature of comparative fault and superseding cause has been noted by a leading admiralty treatise as follows:

> Another aspect of proximate causation is whether an intervening or superseding cause relieves the defendant of liability. In some cases the defendant may be at fault, but the plaintiff or a third party may have committed an act which supersedes, in terms of cause, the fault of the defendant. The doctrine of superseding cause is thus properly applied to preclude direct causation; otherwise the court will apportion liability and damages according to comparative fault.
>
> . . . .
>
> The doctrine of superseding cause is thus applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable. It is properly applied in admiralty cases.

1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 5-3 at 165 (2d ed. 1994). Because the comparative-fault and superseding-cause inquiries are independent, there is no reason to expect that *Reliable Transfer*'s adoption of

comparative fault would have any impact on the doctrine of superseding cause.

The United States' brief on the merits in *Reliable Transfer* reflects that careful consideration was given to the potential effect of replacing the divided damages rule with comparative fault and urges on the Court that no disruption of any other aspect of maritime law would follow.[19] The Solicitor General wrote as follows:

> Adoption of the proportional fault rule by this Court to cover mutual fault collision cases in which the parties' respective degrees of fault can be determined would not create any inconsistencies or anomalies in the law generally, or defeat the intent of other related rules in American admiralty law. Neither would application of the proportional fault rule to cases such as the present upset settled expectations, encourage litigation or create confusion. It would, on the other hand, bring this important aspect of American admiralty law into line with the rules prevailing elsewhere in the world.

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[19] The brief does not specifically discuss superseding cause but, instead, generally references "related rules in American admiralty law." Brief for the United States at 31. *See also id.* 31-36 (discussing the effect of adopting comparative fault on other areas of law; noting adoption of comparative fault in other maritime contexts and in state law). Judicial notice may be taken of pleadings previously filed with the court. *See E.I. Du Pont De Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979); *In re Phillips*, 593 F.2d 356 (8th Cir. 1979) (per curiam); *United States ex rel. Geisler v. Walters*, 510 F.2d 887, 890 n.4 (3d Cir. 1975).

Brief for the United States at 31.[20] The opinion itself reflects that, other than replacing the divided damages rule and its appendages (*e.g.* major/minor fault) with comparative fault, there was no intent to alter settled law.

> "The abrogation of the [divided damages] rule would not, it seems, produce any disharmony with other branches of the maritime law, general or statutory."

421 U.S. at 410.[21]

Nothing in this Court's *Reliable Transfer* decision provides any support – explicit or implicit – to Exxon's contention that the doctrine of superseding cause was overruled and eliminated.

B. Superseding cause was part of admiralty jurisprudence long before *Reliable Transfer*

Exxon suggests that superseding cause is a stranger to general admiralty law.[22] This is not so. The doctrine of superseding cause was addressed in this Court's 1898 decision in *The G.R. Booth*, 171 U.S. 450 (1898). There, the Court held that, under the circumstances, the inflow of sea water following an explosion "was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage;. . . . " 171 U.S. at 460-61. The Court quoted the following from an even earlier case:

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[20] *See also id.* 34-36 (referencing other maritime contexts employing comparative fault). Superseding cause is recognized and applied in those contexts. *See* section IID, *infra*.

[21] *Quoting from* Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 7-20 at 531 (1975).

[22] *See* Exxon br. 20, 29.

> One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.

171 U.S. at 455 (*quoting from Louisiana Mutual Insurance Co. v. Tweed*, 74 U.S. (7 Wall.) 44, 52 (1869)).

Superseding cause was thus securely anchored in admiralty jurisprudence before *Reliable Transfer* was decided.[23]

C. Cases after *Reliable Transfer* recognize the continued existence of the doctrine of superseding cause

The post-*Reliable Transfer* decisions of the federal courts of appeals routinely recognized the continued existence of the doctrine of superseding cause in maritime law.[24]

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[23] *See Williams v. Brasea, Inc.*, 497 F.2d 67, 74 (5th Cir. 1974); *United States v. Rothschild International Stevedoring Co.*, 183 F.2d 181, 182 (9th Cir. 1950); *United States v. Standard Oil Co. of California*, 495 F.2d 911, 916-17 (9th Cir. 1974); *Detyens Shipyards, Inc. v. Marine Industries, Inc.*, 349 F.2d 357, 358-59 (4th Cir. 1965); *United States v. DeVane*, 306 F.2d 182, 187 (5th Cir. 1962); *The Thomas J. Cleaver*, 52 F.2d 913, 915 (3d Cir. 1931). *Cf. Skibs A/S Gylfe v. Hyman-Michaels Co.*, 438 F.2d 803, 805-09 (6th Cir.), *cert. denied*, 404 U.S. 831 (1971).

[24] *See, e.g., Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992); *Lone Star Industries, Inc. v. Mays Towing Co.*, 927 F.2d 1453, 1458-59 (8th Cir. 1991); *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991). *Cf. White v. Johns-Manville Corp.*, 662 F.2d 243, 250 (4th Cir. 1981); *Di Rago v. American Export Lines, Inc.*, 636 F.2d 860, 865-67 (3d Cir. 1981).

Exxon has mustered only one case in support of its argument that *Reliable Transfer* eliminated the doctrine of superseding cause. *See* Exxon br. 28, *citing Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985). Commentators acknowledge that *Hercules* can be given that reading,[25] so Exxon's position cannot be said to be bereft of any claim to judicial support, but the language used in *Hercules* speaks to ordinary intervening cause, not superseding cause.[26]

In his admiralty treatise, Professor Schoenbaum discusses *Hercules* and disagrees with the contention that superseding cause is somehow inconsistent with comparative fault.

> One court has rejected the doctrine of superseding cause, however, on the grounds

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[25] *See, e.g.*, W. J. Miller, *Superseding Cause: Still A Viable Defense in Admiralty*, TUL. MAR. L.J. 210, 222-23 (1994); D.R. Owen & M.H. Whitman., Jr., *Fifteen Years Under Reliable Transfer: 1975-1990 Developments in American Maritime Law in Light of the Rule of Comparative Fault*, J. MAR. L. & COM. 1445, 1460-62 (1991); H.W.H. Lee, *Abandon Ship? The Need to Maintain a Consistency Between Causation in Admiralty and Common Law Tort*, 25 CREIGHTON L. REV. 1007, 1040-41 (1992).

[26] The language quoted by Exxon from *Hercules* states as follows:

> Unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment between the negligent parties, based on their respective degree of fault, is the proper method for calculating and awarding damages in maritime cases.

765 F.2d at 1075.

> that it is inconsistent with the admiralty rule of comparative negligence which apportions liability in accordance with their respective degrees of fault. But the superseding cause doctrine can be reconciled with comparative negligence. Superseding cause operates to cut off the liability of an admittedly negligent defendant, and there is properly no apportionment of comparative fault where there is an absence of proximate causation.

1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 5-3 at 166 (2d ed. 1994). Professor Schoenbaum takes the same position that nearly every court of appeals decision has – that the doctrine of superseding cause "is properly applied in admiralty cases." *Id.* § 5-3 at 165.[27]

D. Superseding cause and comparative fault are fully compatible and routinely co-exist in domestic and foreign jurisdictions

Exxon argues that superseding cause and comparative fault are "irreconcilable" and cannot co-exist but offers no authority in support of its argument. Little wonder – superseding cause and comparative fault

[27] Cases decided in the Eleventh Circuit subsequent to *Hercules* appear to assume the continued existence of superseding cause as a viable admiralty doctrine in that circuit. *See Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508, 1514 (11th Cir. 1989) (whether conduct of stevedore was superseding cause was a question of fact precluding summary judgment); *Edward Leasing Corp. v. Uhlig & Associates, Inc.*, 785 F.2d 877, 883 (11th Cir. 1986) (superseding cause argued but not found under the facts).

uniformly co-exist in federal admiralty law and also in state and foreign law. This attests to the easy compatibility of the doctrines.

Federal admiralty law itself reflects the complementary and harmonious nature of superseding cause and comparative fault. Those doctrines peacefully co-exist in a variety of maritime contexts, each of which involves comparative fault.[28] Perhaps Exxon's position is that, notwithstanding the routine application of superseding cause in many other maritime contexts, it simply does not apply in stranding cases. But no reason has been offered for such disparate treatment, and it would be inconsistent with *Reliable Transfer's* emphasis on uniformity. *See* 421 U.S. at 403-04, 407. *See also Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983) (en banc) (maritime law is "a

[28] In addition to cases cited at notes 23 and 24, *see, e.g., Saratoga Fishing Co. v. Marco Seattle, Inc.*, 69 F.3d 1432, 1442-43 (9th Cir. 1995) (maritime products liability claim); *Kirk Line*, 877 F.2d at 1513-15 (Carmack amendment and common law); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1489 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989) (Death On The High Seas Act and admiralty claims); *Craine v. United States*, 722 F.2d 1523, 1525-26 (11th Cir. 1984) (Federal Tort Claims Act claim arising out of boating deaths); *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777, 781-83 (3d Cir. 1978) (claim under stevedore's warranty of workmanlike performance). *Cf. Jackson v. Pittsburgh S.S. Co.*, 131 F.2d 668, 669-70 (6th Cir. 1942) (Jones Act personal injury claim); *Hagemeyer Trading Co. v. St. Paul Fire & Marine Ins.*, 266 F. 14, 17 (2d Cir.), *cert. denied*, 253 U.S. 497 (1920) (marine insurance claim).

conceptual body whose cardinal mark is uniformity").[29] The uniform application of superseding cause in federal admiralty law refutes Exxon's attempt to read its demise into *Reliable Transfer*.

State law demonstrates that comparative fault and superseding cause are complementary doctrines that routinely exist side-by-side. Of the forty-six states that have adopted comparative fault,[30] at least forty-four recognize and apply superseding cause.[31] This uniformly-recognized co-existence of superseding cause and comparative fault under state law rebuts Exxon's protests regarding incompatibility.

Foreign law also refutes Exxon's "incompatibility" theory. Superseding cause and comparative fault co-exist in the law of other nations, including signatories to the Brussels Collision Liability Convention of 1910, which was referenced in *Reliable Transfer*.[32] *See, e.g., Reardon*

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[29] *Timco, Inc.* noted that comparative fault applies to unseaworthiness claims, Jones Act personal injury claims, Death On The High Seas Act claims, longshoremen's claims under the Longshoremen's And Harbor Workers' Compensation Act, and maritime product liability claims. 716 F.2d at 1427-28.

[30] *See* Henry Woods, COMPARATIVE FAULT § 1:11 (2d ed. 1987 & Supp. 1995).

[31] Appendix A gathers cases reflecting that superseding cause is a viable doctrine under the comparative fault models of the various states. These cases are gathered, not for the application of superseding cause under the respective facts, but simply to show that superseding cause and comparative fault are not mutually exclusive but routinely co-exist. South Carolina and Oregon are the potential exceptions.

[32] In support of its decision to replace the divided damages rule with comparative fault, the Court noted that comparative fault had been adopted by most other maritime nations. 421 U.S. at 403-04.

Smith Line, Ltd. v. Australian Wheat Board, A.C. 266 (H.L.) (1956) (on appeal from the High Court of Australia) (Australia); *Rushton v. Turner Brothers Asbestos Co.*, 1 W.L.R. 96 (1960) (England); *G.W. Grace & Co. v. General Steam Navigation Co.*, 2 K.B. 383 (1950) (same); *The Oropesa*, 1 All E.R. 211 (1943) (same); *S.S. Singleton Abbey v. S.S. Paludina*, A.C. 16 (1927) (same); *Bow Valley Husky (Bermuda) Ltd. v. St. John's Shipbuilding Ltd.*, 126 D.L.R.4th 1 (1995) (Canada);[33] *McKew v. Holland & Hannen & Cubitts (Scotland), Ltd.*, 3 All E.R. 1621 (1969) (Scotland).

Exxon professes to find something incompatible between comparative fault and superseding cause. No incompatibility exists. Whether under federal admiralty law, state law, or foreign law, the doctrines are uniformly regarded as compatible.

E. The district court's application of superseding cause did not "violate" *Reliable Transfer*

Exxon takes the position that, in two respects, the application of superseding cause below "violated" *Reliable Transfer*. First, Exxon argues that, under *Reliable Transfer*, respondents' faults must be compared with Exxon's faults. *See* Exxon br. 27. The flaw in that argument is that *Reliable Transfer* has no such requirement. *Reliable Transfer* requires only a comparison of faults that are a legal cause of the incident. To argue otherwise would negate a necessary element of the tort itself.

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[33] In *Bow Valley*, an application is pending seeking leave to appeal to the Supreme Court of Canada (Court file No. 24855).

Unless the "fault" constitutes a legal cause, it does not figure in the comparative fault calculus.[34]

If Exxon retreats and argues that every fault that is a cause in fact must be compared, that position too is indefensible. The potential causes in fact are innumerable. The construction of the vessel, its fueling, its departure from Alaska for the voyage to Oahu – all these constitute causes in fact – *i.e.*, but for their occurrence the vessel could not have been run aground. However, no one would suppose that these factors should be included under a comparative fault analysis. In comparative fault analysis, the conduct to be compared must constitute a legal cause of the harm.[35]

The second "violation" of *Reliable Transfer* that supposedly results from the district court's application of superseding cause is reflected in Exxon's "deterrent effect" argument. *See* Exxon br. 26-27. "Deterrent effect," of course, cannot really be said to be a holding of *Reliable Transfer* and does not constitute an enforceable legal standard. Neither this Court nor any other sits to enforce illusory standards like "deterrent effect" or "best situated." There is no reason to believe that *Reliable Transfer* (or any other decision) seeks to impose a "deterrent

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[34] Any argument that legal cause and comparative fault must be analyzed simultaneously in the same proceeding is addressed in response to Exxon's bifurcation argument. *See* section V, *infra*.

[35] Accord 1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 5-3 at 166 (2d ed. 1994) ("there is properly no apportionment of comparative fault when there is an absence of proximate causation"). *See also* Grant Gilmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY § 7-5 at 494 (1975) ("the 'fault' that is to produce liability must be not mere fault in the abstract, but fault that is a contributory cause of the collision").

effect" on a party whose conduct is not a legal cause of any injury. Again, any such argument is inconsistent with the underlying cause of action itself.

The "factual" basis of Exxon's "deterrent effect" argument is equally flawed. Exxon argues that respondents were "best situated" to prevent the stranding, but the district court's unchallenged findings conclusively establish the contrary. The district court found that it was Exxon's conduct that caused the stranding and that Exxon was "best situated" to prevent the stranding. *See* JA 152-59; 171 (¶¶37-39); 173-76 (¶¶44-46). The stranding was not the result of the breakout. Any dangers associated with the breakout had passed.

> The harm that the breakout risked was that a disabled ship would have been driven onto the shore before it could reach safety. The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger.

[JA 174 (¶44a)] *See also* JA 175 (¶46).

Contrary to Exxon's argument, no "violation" is created by the district court's finding of superseding cause here. *Reliable Transfer* is wholly compatible with the doctrine of superseding cause, and the doctrine is routinely applied in a wide variety of maritime contexts. Its application is compelled under the facts and circumstances present here.

III. *ITALIA SOCIETA* DOES NOT SUPPORT EXXON'S WARRANTY CLAIMS

Italia Societa[36] involved a wholly different set of facts and issues than those involved here. "The issue presented is whether the warranty is breached where the stevedore has nonnegligently supplied defective equipment which injures one of its employees during the course of stevedoring operations." 376 U.S. at 315-16. That case dealt with the nature of a stevedore's duty under an implied warranty. It did not address causation or the recoverability of damages under the circumstances present here.

In its effort to bring this case within the purview of *Italia Societa,* Exxon again resorts to its "deterrent effect" argument. Exxon argues (1) that *Italia Societa* "establishes the policy of placing the risks of loss on the persons who are best situated to prevent injuries" and (2) that HIRI, not Exxon, was "best situated." [Exxon br. 35] Setting aside the difficulties with Exxon's first premise (and whether such a broad statement can properly be construed as *Italia Societa*'s holding), the second premise is flatly precluded by the district court's findings of fact, which establish that Exxon caused the stranding and was "best situated" to prevent it. *See* JA 152-59; 171 (¶¶37-39); 173-76 (¶¶44-46). The language quoted by Exxon from *Italia Societa* speaks in terms of "injury-producing and defective equipment," but the "Injury producer" here was Exxon's own conduct – the grossly negligent handling of the vessel.

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[36] *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

Exxon attacks the district court's refusal to award damages for the loss of its tanker under a breach of warranty theory, arguing that the extraordinary misconduct of its tanker captain relates to the recoverability of damages, but not to liability.

> Negligence of a shipowner, in whose favor the warranty runs, may reduce the damages for which the warrantor is liable to the extent that such negligence constitutes the failure to mitigate damages; it does not defeat liability for breach of contract.

[Exxon br. 35] But what Exxon says should happen is precisely what did happen here. The judgment entered by the district court simply denied Exxon recovery for the stranding-related damages that, under the district court's unchallenged findings, were not a foreseeable consequence of the breakout and were easily avoidable by Exxon.

The principal focus below was on legal causation and superseding cause. But the findings made by the district court also support the entry of judgment denying recovery of stranding-related damages under Exxon's warranty theory. Two distinct contract doctrines applicable in admiralty law compel this. The first is the doctrine of avoidable consequences, often referred to as mitigation. Professor Corbin described the doctrine as follows:

> Since the purpose of the rule concerning damages is to put the injured party in as good a position as he would have been put by full performance of the contract at the least necessary cost to the defendant, the plaintiff is never given judgment for damages for losses that he could have avoided by reasonable effort without risk of other substantial loss or injury.

5 Arthur L. Corbin, CORBIN ON CONTRACTS § 1039 at 241 (1964). Dean Farnsworth, the Reporter for the RESTATEMENT (SECOND) OF CONTRACTS, states the rule as follows:

> A court ordinarily will not compensate an injured party for loss that that party could have avoided by making efforts appropriate, in the eyes of the court, to the circumstances.

III E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 12.12 at 219 (1990).[37]

The doctrine of avoidable consequences has been discussed and applied in a variety of maritime contexts. *See, e.g., Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1474-1476 (5th Cir. 1991) (vessel ruptured pipeline which resulted in loss of gas well); *Delta Transload, Inc. v. M/V Navios Commander*, 818 F.2d 445, 452 (5th Cir. 1987) (damages for loss of mooring buoy and chain); *Federal Insurance Co. v. Sabine Towing & Transportation Co.*, 783 F.2d 347, 350 (2d Cir. 1986) (cargo damage); *Hagerty v. L&L Marine Services, Inc.*, 788 F.2d 315, 319 (5th Cir. 1986) (Jones Act); *Southport Transit Co. v. Avondale Marine Ways, Inc.*, 234 F.2d 947, 951-54 (5th Cir. 1956) (loss of tug by fire).

Here, the district court found that Exxon could have avoided the stranding by means that were not only readily available but were, in fact, required by Exxon's own company guidelines and by longstanding maritime custom and practice.

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[37] *See also* 11 Samuel Williston, A TREATISE ON THE LAW OF CONTRACTS § 1353 (3d ed. 1968); Howard O. Hunter, MODERN LAW OF CONTRACTS ¶14.07 (rev. ed. 1993); RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981).

> Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.

[JA 171 (¶37)][38]

> Backing out to sea or turning to port were viable and safe alternatives to the starboard turn. These options would have taken the EXXON HOUSTON away from the coast rapidly, allowing Captain Coyne to leave the bridge and attend to AB Denton.

[JA 158 (¶79)][39] Captain Coyne not only failed to take steps to avoid danger, he affirmatively placed the vessel in danger and drove it onto the reef. Accordingly, under the doctrine of avoidable consequences, Exxon cannot recover damages for the stranding under any theory.

The second contract doctrine that forecloses recovery by Exxon for stranding-related damages is the doctrine of foreseeability. The RESTATEMENT puts the rule as follows:

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

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[38] *See also* JA 156-57 (¶¶69-71).

[39] *See also* JA 171 (¶39) ("The danger of stranding could and would have been avoided had Captain Coyne backed out or ordered a left turn instead of attempting a right turn.").

> (a) in the ordinary course of events, or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).[40]

Here, in the words of the RESTATEMENT, it cannot be said that the stranding "follows from the breach in the ordinary course of events" or that the stranding occurred "as a result of special circumstances beyond the ordinary course of events that [HIRI] had reason to know." It was not foreseeable that the vessel's captain, having reached a position of safety and having complete control of the vessel, would make a turn toward the coast and drive the ship onto a charted reef. Similarly, it was not foreseeable that the vessel's captain would let more than an hour and a half pass without any attempt to fix the vessel's location or would make no effort to determine the vessel's location before making a dangerous turn toward the coast.

The grossly negligent conduct of Captain Coyne was not a foreseeable consequence of any alleged failure associated with the breakout. The district court's findings, while in the context of tort law, are explicit in this regard and are equally preclusive of any contract claim.

> Captain Coyne's attempt to turn the ship towards the coast was extraordinarily negligent and not a foreseeable consequence of the breakout.

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[40] *See also* 5 Arthur L. Corbin, CORBIN ON CONTRACTS § 1007 (1964); III E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 12.14 (1990); 11 Samuel Williston, A TREATISE ON THE LAW OF CONTRACTS § 1344 (3d ed. 1968).

> The decision to make the final turn was made independently of the breakout and was not foreseeable.

[JA 175 (¶45(b); ¶45(c)) (citations omitted)]

It is also noteworthy that the damages sought by Exxon failed the foreseeability test under proximate cause, which is more expansive than the foreseeability requirement for contract damages.

> [T]he requirement of foreseeability is a more severe limitation of liability than is the requirement of substantial or "proximate" cause in the case of an action in tort or for breach of warranty.

RESTATEMENT (SECOND) OF CONTRACTS § 351 comment a at 136 (1979).

> The rules of foreseeability set contract cases apart from cases in tort. In a contract case, a plaintiff's recoverable damage must have been a foreseeable result of the breach of the contract. It is not enough to show that the damage followed naturally from the breach, which is sufficient proof in a tort case. There must be a more direct connection between the damage and the risks actually assumed by the parties when they entered into the agreement.

Howard O. Hunter, MODERN LAW OF CONTRACTS ¶ 14.03[3][a] (rev. ed. 1993). *See also* III E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 12.14 at 243 (1990). Here, under the district court's findings, the stranding was not foreseeable under the relaxed proximate cause standard. Therefore, it cannot be foreseeable under the more stringent contract standard.

Because the stranding of the vessel was not a foreseeable consequence of any alleged breach by HIRI and was, instead, a consequence that Exxon could have readily

avoided, the district court properly refused to permit Exxon to recover stranding-related damages from HIRI. Basic contract law, applicable under the district court's unchallenged findings, prohibits such a recovery.

IV. THE DISTRICT COURT'S FINDINGS OF FACT ARE BINDING UNDER RULE 52 AND SUPPORT THE ENTRY OF JUDGMENT BELOW

After taking evidence for the better part of three weeks, including conflicting testimony from expert witnesses, the district court made specific findings regarding controlling issues of fact – gross negligence, superseding cause, foreseeability, avoidability, etc. Each of these matters is a question for the factfinder, subject to review under Rule 52's clearly erroneous standard.[41] These findings fully support the judgment entered below.

Exxon mounted only a limited Rule 52 challenge in the Ninth Circuit,[42] and even that limited challenge has been abandoned in this Court.[43] There has been no

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[41] *See, e.g., Milwaukee & St. P. Ry. v. Kellogg*, 94 U.S. 469, 474-75 (1877) (superseding cause); *Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 872 (10th Cir. 1993) (same); *Springer v. Seamen*, 821 F.2d 871, 876-77 (1st Cir. 1987) (same); *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 791-92 (6th Cir. 1984) (same); *Bergerco, U.S.A. v. The Shipping Corporation of India, Ltd.*, 896 F.2d 1210, 1212 (9th Cir. 1990) (foreseeability); *Redman v. County of San Diego*, 924 F.2d 1435, 1445 (9th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992) (gross negligence); *Rogers v. Gracey-Hellums Corp.*, 442 F.2d 1196 (5th Cir. 1971) (same).

[42] *See* 54 F.3d at 579. [JA 233]

[43] The words "clearly erroneous" are not found in Exxon's brief, and no Rule 52 challenge is within the scope of the questions presented in Exxon's petition for certiorari. Any attempt to interject such a challenge now, therefore, would be improper under Sup. Ct. R. 14.1.

careful analysis by Exxon of the evidence in light of the clearly erroneous standard of Rule 52; nothing has been said to demonstrate that the district court's account of the evidence was not "plausible" or that the district court adopted an "impermissible view" of the evidence. This is the burden that any such challenge must meet. *See Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Exxon is bound, therefore, by the district court's findings of fact.[44]

Notwithstanding its failure to raise a Rule 52 challenge in this Court, Exxon disregards the district court's explicit findings and argues, among other things, that respondents should have foreseen the extraordinary misconduct of the tanker captain and, therefore, that such misconduct cannot constitute a superseding cause.[45] This cavalier treatment of the district court's findings appears to be an oblique invitation by Exxon for this Court to reweigh the evidence and re-try issues laid to rest below. As reflected in its Rule 52 jurisprudence, this Court does not sit for that purpose.

A. Appellate review of findings under Rule 52

Bessemer City states the controlling principle that, under Rule 52, the factfinder's choice between permissible views of the evidence cannot constitute clear error. 470 U.S. at 573-74. *Accord Zant*, 486 U.S. at 223, 225-26. The policy and rationale mandating deference to the trial court as the finder of fact has been stated as follows:

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[44] Although unwilling to engage in a direct Rule 52 challenge, Exxon is apparently willing to impugn the competence of the district judge. *See* Exxon br. 4 n.4.

[45] *See* Exxon br. 29.

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Bessemer City, 470 U.S. at 574-75.

This Court also foreclosed any notion that "ultimate" and "subsidiary" facts should be treated differently and held that, in applying the "clearly erroneous" standard, no distinction is to be made between "ultimate" findings and "subsidiary" findings.

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

The foregoing controlling principles preclude any attempt by Exxon to re-visit the facts in this Court.

B. Exxon's arguments regarding superseding cause do not undermine the district court's explicit findings

Exxon's brief contains a variety of attacks regarding superseding cause, but none undermines the district

court's finding that Exxon's conduct was the superseding cause of the stranding. First, Exxon attacks a strawman of its own creation by arguing that "[w]hat the Ninth Circuit has actually done is to resurrect contributory negligence as a complete defense to liability for maritime negligence and strict products liability by dubbing the defense 'superseding cause.' " [Exxon br. 32] This, of course, is simply not true. The doctrine of contributory negligence played no part in either court below. Superseding cause and contributory negligence are distinct and independent doctrines.[46] And, as demonstrated in section III above, the doctrine of superseding cause is firmly embedded in maritime jurisprudence.

Exxon also seeks to sow confusion by arguing that "the Ninth Circuit's conclusion that the Captain's negligence was the 'sole' cause of the stranding is inconsistent with the respondents' admission that their own conduct was a cause in fact of the casualty." [Exxon br. 32] This also is an exercise in misdirection. There is, of course, no inconsistency between the finding that Exxon's misconduct was the sole proximate cause and the notion that the breakout was a cause in fact. Legal causation and physical causation are, of course, different concepts. The district court found that the conduct of Exxon's tanker captain was the sole proximate cause, and that finding has not been challenged here.

The force associated with the breakout had run its course and was spent before the stranding occurred. This case does not involve a vessel "cast adrift" in a confining river and helpless before its forces. Rather, when the

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[46] *See* RESTATEMENT (SECOND) OF TORTS § 440 (superseding cause); §§ 463 and 465 (contributory negligence).

vessel broke its moorings, it was fully manned and fully operational. In scant minutes, the tanker was under power and moving purposefully under the guidance of its captain. Within 12 minutes, the tanker had reached a safe anchorage,[47] and all dangers associated with the breakout had evaporated. Exxon was in control. That control continued as Captain Coyne decided not to anchor the ship at its safe, 1747 location and directed the ship through a series of maneuvers and out toward open ocean. Exxon was still in control at 1956 when the order was given not to back out to sea, not to turn to port, but to turn to starboard – toward the coast. Captain Coyne directed the blind right turn even though no navigational positions had been fixed and plotted since 1830. The district court found that these decisions were unforeseeable and were made independently by Exxon.[48]

Exxon's reference to Section 442B of the RESTATEMENT (SECOND) OF TORTS is unavailing. Here, implicit in the district court's findings is the conclusion that the breakout was not a substantial factor in causing the stranding. Instead, the stranding was caused by the conduct of Captain Coyne. Section 442B is also inapplicable in view of the district court's finding that the stranding was not within the scope of any risk associated with the breakout.

> The harm that the breakout risked was that a disabled ship would have been driven onto the shore before it could reach safety. The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger.

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[47] *See* JA 148 (¶35).

[48] *See* JA 175 (¶45(b-c)).

> . . .
>
> The harm resulting from the final turn was the stranding at a point far from the SPM. The harm that could have resulted from the breakout was a grounding before the ship regained control. These harms are different in kind.

[JA 174 (¶44(a); 175 ¶45(a))][49]

The district court's findings reflect that the conduct of Captain Coyne was unforeseeable, grossly and extraordinarily negligent, and a superseding cause of the stranding. Similarly, the district court found that the stranding was an avoidable consequence and that Exxon's conduct was the sole proximate cause. These findings, and the others made by the district court, support the judgment entered below.

V. BIFURCATION DOES NOT RAISE ISSUES OF CONSTITUTIONAL MOMENT AND WAS A PROPER EXERCISE OF DISCRETION BY THE TRIAL JUDGE IN ADMINISTERING HIS DOCKET

As is noted preliminarily, issues relating to bifurcation are not within the scope of the questions presented in Exxon's petition for certiorari and are not properly before this Court. However, in view of the treatment by Exxon and the *Amicus* in their respective briefs, a response is thought appropriate.

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[49] Apparently, Exxon seeks to expansively define the "harm" as stranding generally, without regard to when, where, or how the stranding takes place. Under Exxon's definition, if Captain Coyne had turned to port rather than toward the coast, circled the island of Oahu (or even returned to Alaska), and then run aground, that grounding would be a "harm" associated with the breakout. The district court's analysis makes much more sense and reflects the reality of the situation.

Exxon argues that the district court's decision under Rule 42 to bifurcate proceedings and conduct a separate trial on proximate cause violates the Fifth Amendment. To the contrary, the bifurcation order was proper in every respect. It resulted in substantial savings of judicial resources and significantly reduced the expenditure of time and money by the parties. The parties were fully heard on an independent, case-dispositive issue. There was no sacrifice of fundamental fairness, and due process considerations were not compromised in any respect. Exxon's protests to the contrary cannot withstand scrutiny.

The fundamental premise of Exxon's due process argument is that it is *per se* improper to conduct a separate trial of proximate or legal causation. Exxon has failed to demonstrate, or even explain, why this should be so, and the sweeping implications of Exxon's argument compel its rejection. If Exxon's suggestion were adopted, it would change trial practice throughout the country. Every trial court – state and federal – would be constitutionally disabled from severing the issue of proximate cause for separate trial. And, if proximate cause is to be treated as inherently unseverable, what of other elements of common law claims and defenses?

The rule proposed by Exxon and the *Amicus* is problematic for complex multi-party litigation. If, as the *Amicus* argues, "the trial court should always examine the conduct of all parties," the resulting litigation tactics are apparent. Parties against whom a remote claim can be asserted will be joined, and, unless they can prevail under Rule 56 (which is doubtful given the fact-intensive nature of foreseeability, proximate cause, and comparative fault), their only choices will be to pay the plaintiff's

substantial "exit" price or to bear the crushing expense of protracted litigation. With bifurcation unavailable under the Exxon rule (at least with respect to legal causation), the hands of the trial judge would be tied.

Reliable Transfer did not impose any requirement that a full trial for all parties on all aspects of a collision/stranding case be tried in a single proceeding. Nothing in comparative fault doctrine gives rise to any such requirement either. Neither Exxon nor the *Amicus* has stated why the trial judge's discretion under Rule 42(b) should be *per se* circumscribed in this manner.

A. Exxon has been fully heard on legal causation, and, therefore, bifurcation did not prejudice Exxon in any respect

Exxon has never pretended that it was not fully heard on legal causation, and a review of the evidence that Exxon "would have offered" reveals that this evidence has no bearing on either superseding cause or proximate cause. Exxon describes its "offer of proof" as follows:

> Exxon offered to prove that the HIRI respondents knew that the berth was unsafe before the HOUSTON sailed to Hawaii. Before the HOUSTON incident, two different tankers had broken away from the SPM. The HIRI respondents had been repeatedly advised by their own experts that breakaways were inevitable; they nevertheless had removed the quick release couplings with which the cargo hoses had been initially equipped, and they failed to replace them after their own experts advised them the hoses were dangerously unsafe without such releasing devices; HIRI had been advised that

> the mooring was unsafe unless particular additional safety measures were taken. The HIRI respondents ignored all the warnings, installed none of the safety devices and took none of the other recommended safety measures.

[Exxon br. 7] Nothing set out in the foregoing has anything to do with whether Captain Coyne's conduct was, or was not, a superseding cause or a foreseeable event, or whether the breakout itself was, or was not, a proximate cause. The allegations detailed above relate to whether a breach occurred, but they are completely unrelated to legal causation, which was the subject of the phase I bifurcated proceeding.

Exxon's "offer of proof" is completely unrelated to the issue of legal causation, which was before the district court. Accordingly, the exclusion of that evidence from the phase I trial did not prejudice Exxon and cannot constitute a violation of the Fifth Amendment. The exclusion of irrelevant evidence is not error, nor does every evidentiary ruling implicate due process.

B. By its very nature, superseding cause is an independent and distinct issue that is appropriate for separate trial

The RESTATEMENT recognizes that superseding cause, by its very nature, is particularly well-suited for separate trial under Rule 42.

> A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm. Therefore, if in looking back from the harm and tracing the sequence of events by which it was produced, it is found that a superseding cause has operated, ***there is no need of determining whether the actor's antecedent conduct was or was not a substantial factor in bringing about the harm.***

RESTATEMENT (SECOND) OF TORTS § 440 comment b at 465 (1965) (emphasis added). The RESTATEMENT simply reflects the common sense of the matter – a determination that a superseding cause exists obviates the need for further proceedings on liability. This is precisely what occurred here.

The separate trial of causation has been ordered and affirmed in both admiralty and non-admiralty cases where, as here, it appeared that a determination of causation would likely resolve the entire case. *See In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988); *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982); *Hasbro Ind. v. St. Constantine*, 1980 A.M.C. 1324 (D. Hawaii 1980), *aff'd*, 705 F.2d 339 (9th Cir. 1983); *Adelson v. United States*, 523 F. Supp. 459, 461 (N.D. Cal. 1981).[50] *See also Johnson v. Washington Metropolitan Area Transit Authority*, 764 F. Supp. 1568, 1581 (D.D.C. 1991) (in considering admissibility of drug test evidence, the trial court stated that conducting a separate trial of proximate cause would obviate potential prejudicial effect).

Legal causation is a distinct and independent issue that is appropriate for separate trial under Rule 42. Here, as the district court noted, that issue was potentially case-dispositive. [JA 71-75] Accordingly, it was well within the district court's discretion to order a separate trial on proximate cause.

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[50] The bifurcation in *Adelson* was agreed to by the parties, but *Adelson* nonetheless reflects the propriety of resolving legal causation as a separate issue.

C. *Gasoline Products* does not support Exxon's position

In attacking the bifurcation order, Exxon proffers *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), as its centerpiece. *Gasoline Products* was a Seventh Amendment case. The issue involved was whether, on remand, damages alone could be tried to a new jury or whether both liability and damages would need to be heard. This Court held that, without evidence on liability issues, the jury would not have the information needed to decide the damages issues. 283 U.S. at 499-500. Because a determination of damages could not be made without evidence relating to contract liability, the Court held that the damages and liability issues could not be tried separately. *Id.* at 500.

The situation is much different here. The bifurcation order did not contemplate two different factfinders. More importantly, issues relating to legal causation are separate and distinct from those relating to comparative fault, and evidence related to comparative fault is not required to decide legal causation.

D. Bifurcation is an important case management tool in the district courts and was properly employed below

Exxon appears to regard bifurcation as a suspect procedure. However, it is plainly authorized under Rule 42(b) and constitutes an important tool for district judges to use in administering their docket.

> Rule 42 provides two wholly different procedures that are designed to achieve a common end. That objective is to give the court broad discretion to decide how cases on its docket are

> to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties. . . . These procedures have proven extremely useful over the years; this has been particularly true ever since the tremendous growth in multi-party and multi-claim litigation in the federal courts.

9 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2381 at 427 (1995).[51]

Here, in view of the extraordinary lapse of time between the breakout and the stranding and the extraordinary misconduct of the tanker captain, it was readily apparent that the issue of legal causation was an independent and potentially case-dispositive issue. The determination of that issue had the potential for avoiding protracted pretrial and trial proceedings on other issues and also for facilitating settlement. *See* JA 72-73. These are the precise circumstances that call for a separate trial under Rule 42(b).

> If a single issue could be dispositive of the case or is likely to lead the parties to negotiate a settlement, and resolution of it might make it unnecessary to try the other issues in the litigation, separate trial of that issue may be desirable

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[51] "Rule 42(b) therefore acts as a counterbalance to the joinder rules by giving the court virtually unlimited freedom to try the issues in whatever way trial convenience requires. An exhaustive study of the practical operation of the rule concludes: 'on the whole the separate trial has proved a very flexible and useful instrument for preventing confusion, avoiding prejudice, and providing a convenient method of disposing of litigation as fairly and quickly as possible. The rule serves its purpose in modern pleading.' " *Id.* § 2387 at 472.

to save the time of the court and reduce the expense of the parties.

Id. § 2388 at 476.

CONCLUSION

For the foregoing reasons, HIRI respectfully submits that the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

I. Cases reflecting that superseding cause exists under the circumstances present in that case or that the evidence warrants submitting the issue of superseding cause to the factfinder:

Alaska	*Lake v. Construction Machinery, Inc.*, 787 P.2d 1027 (Alaska 1990)
Arkansas	*Carroll Elec. Cooperative Corp. v. Carlton*, 892 S.W.2d 496 (Ark. 1995)
California	*Brewer v. Teano*, 47 Cal. Rptr.2d 348 (Cal. App. 2 Dist. 1995)
Connecticut	*Heritage Village Master Ass'n, Inc. v. Heritage Village Water Co.*, 622 A.2d 578 (Conn. App. 1993)
Delaware	*Duphily v. Delaware Elec. Coop., Inc.*, Del. Supr., 662 A.2d 821 (Del. 1995)
Florida	*Palm Beach County Bd. of Com'rs v. Salas*, 511 So.2d 544 (Fla. 1987)
Georgia	*Roseberry v. Brooks*, 461 S.E.2d 262 (Ga. App. 1995); *Gafford v. Duncan*, 436 S.E.2d 78 (Ga. App. 1993)
Hawaii	*Leary v. Poole*, 705 P.2d 62, 66 (Hawaii App. 1985)
Illinois	*Benner v. Bell*, 602 N.E.2d 896 (Ill. App. 4 Dist. 1992)
Indiana	*Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514 (Ind. 1994)
Kansas	*Barkley v. Freeman*, 827 P.2d 774 (Kan. App. 1992)
Louisiana	*Bourne v. Seventh Ward General Hospital*, 546 So.2d 197 (La. App. 1 Cir. 1989)

Massachusetts	*Solimene v. B. Grauel & Co., K.G.*, 507 N.E.2d 662 (Mass. 1987)
Minnesota	*Hafner v. Iverson*, 343 N.W.2d 634 (Minn. 1984)
Mississippi	*O'Cain v. Harvey Freeman & Sons, Inc.*, 603 So.2d 824 (Miss. 1991); *Foster by Foster v. Bass*, 575 So.2d 967 (Miss. 1990)
Missouri	*Buck v. Union Elec. Co.*, 887 S.W.2d 430 (Mo. App. 1994)
Nevada	*Doud v. Las Vegas Hilton Corp.*, 864 P.2d 796 (Nev. 1993)
New Jersey	*Davis v. Brooks*, 655 A.2d 927 (N.J. Super. Ct. App. Div. 1993)
New Mexico	*Sarracino v. Martinez*, 870 P.2d 155 (N.M. App. 1994)
New York	*Shahzaman v. Green Bus Lines Co.*, 625 N.Y.S.2d 631 (N.Y. App. Div. 1995)
Ohio	*Bruns v. Cooper Indus., Inc.*, 605 N.E.2d 395 (Ohio App. 2 Dist. 1992)
Oklahoma	*Minor v. Zidell Trust*, 618 P.2d 392 (Okl. 1980)
Pennsylvania	*Powell v. Drumheller*, 653 A.2d 619 (Pa. 1995); *Hicks v. Metropolitan Edison Co.*, 665 A.2d 529 (Pa. Commw. 1995)
Rhode Island	*Walsh v. Israel Couture Post, No. 2274*, 542 A.2d 1094 (R.I. 1988)
South Dakota	*Holmes v. Wegman Oil Co.*, 492 N.W.2d 107 (S.D. 1992)
Texas	*Venetoulias v. O'Brien*, 909 S.W.2d 236 (Tex. App. – Houston [14th Dist.] 1995, writ requested)

Tennessee	*Haynes v. Hamilton County*, 883 S.W.2d 606 (Tenn. 1994)
Washington	*Cramer v. Department of Highways*, 870 P.2d 999 (Wash. App. Div. 1 1994)
Wyoming	*Lynch v. Norton Construction, Inc.*, 861 P.2d 1095 (Wyo. 1993)

II. Cases indicating generally that superseding cause and comparative fault co-exist:

Arizona	*Petolicchio v. Santa Cruz County Fair*, 866 P.2d 1342 (Ariz. 1994); *Smith v. Johnson*, 899 P.2d 199 (Ariz. App. Div. 1 1995)
Colorado	*Bath Excavating & Const. Co. v. Wills*, 847 P.2d 1141 (Colo. 1993); *Voight v. Colorado Mountain Club*, 819 P.2d 1088 (Colo. App. 1991)
Idaho	*Orthman v. Idaho Power Co.*, 895 P.2d 561 (Idaho 1995)
Iowa	*Hagen v. Texaco Refining & Marketing*, 526 N.W.2d 531 (Iowa 1995)
Kentucky	*NKC Hospitals, Inc. v. Anthony*, 849 S.W.2d 564 (Ky. App. 1993)
Maine	*Ames v. Dipietro-Kay Corp.*, 617 A.2d 559 (Me. 1992)
Michigan	*Hickey v. Zezulka*, 487 N.W.2d 106 (Mich. 1992)
Montana	*Sizemore v. Montana Power Co.*, 803 P.2d 629 (Mont. 1990)
Nebraska	*Anderson v. Nebraska Dept. of Soc. Serv.*, 538 N.W.2d 732 (Neb. 1995); *Merrick v. Thomas*, 522 N.W.2d 402 (Neb. 1994)

New Hampshire	*Weldy v. Town of Kingston*, 514 A.2d 1257 (N.H. 1986)
North Dakota	*Champagne v. U.S.*, 513 N.W.2d 75 (N.D. 1994)
Texas	*City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994)
Utah	*McCorvey v. Utah State Dept. of Transportation*, 868 P.2d 41 (Utah 1993)
Vermont	*Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48 (2d Cir. 1992) (applying Vermont law)
West Virginia	*Wehner v. Weinstein*, 444 S.E.2d 27 (W.Va. 1994)
Wisconsin	*Voight v. Riesterer*, 523 N.W.2d 133 (Wis. App. 1994)